2714 No. 13122

United States Court of Appeals
For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as Administrator of the Estate of William F. Leland, Deceased, and C. W. BREAKIRON, Successor Receiver for Atlantic and Pacific Airlines,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED, ORION INSURANCE COMPANY, LIMITED, THE DRAKE INSURANCE COMPANY, LIMITED, subscribing underwriting members of Lloyd's, London,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

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535 Central Building,
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THE ARGUS PRESS, SEATTLE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENTS REGARDING PLEADINGS AND JURISDICTION

Ths appeal is from a judgment denying recovery on a policy of aircraft insurance. The principal plaintiff is R. P. Jandl, administrator of the estate of William F. Leland who was the owner of the insured aircraft and was killed in the accident in which it was destroyed. United States of America and C. W. Breakiron, Receiver, joined as plaintiffs because they have

an interest in the insurance proceeds as mortgagees of the insured property.

The complaint alleges and the answer admits that the amount in controversy, exclusive of interest and costs, exceeds $3,000 and that the defendants are subjects of the British Empire (R. 3, 4, 8). The District Court had jurisdiction under U.S.C.A., New Title 28, §1332 (2) and §1345, on the ground of diversity of citizenship and because the United States is a plaintiff.

Jurisdiction of this court to review the judgment is conferred by U.S.C.A., New Title 28, §§ 1291, 1294, and by Rules of Civil Procedure for District Courts, Rule 73.

The amended complaint contains two claims or causes of action. The first claims $20,054.47 and interest under Section 1 of the policy for loss or damage to the insured aircraft. The second claim is under Section 2 of the policy for indemnity against a judgment for $2,566.70 obtained by King County, Washington, against Leland's estate for damages caused to its revetment hangar by the insured airplane. The second claim also asks judgment for expense insurred in defending that action after the appellees refused to defend it (R. 29, 30, 31).

STATEMENT OF THE CASE

All material facts pleaded in the amended complaint were admitted by appellees or proved by undisputed evidence. Aside from merely formal matters, these facts are: On July 21, 1948, appellees issued Lloyd's Certificate of Insurance No. W-OMA-253 (herein sometimes called "the policy") to Leland, insuring him as the owner of Douglas DC-3 airplane No. NC-79025. A true copy of the policy is attached to the amended complaint as Exhibit A (R. 8, 25, 26, 66).

Section 1 of the policy, insofar as it appears material to this case, reads:

> "SECTION 1—LOSS OR DAMAGE TO AIRCRAFT
>
> "A. The Underwriters will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except frost, wear and tear, gradual deterioration, mechanical breakage or breakdown, but including accidental damage caused thereby. This Section shall include loss or damage by burglary, theft or malicious means unless it be proved by the Underwriters that such loss or damage was caused by a servant or agents or person under the control of the Assured.
>
> "B. It is understood and agreed that Underwriters' liability under this Section in respect of any Aircraft shall not exceed the Agreed Value including all equipment and accessories, as set forth in Column 8 of the Schedule, subject each and every claim in respect of Flight Risks to the

deductible applicable to each such Aircraft as set forth in Column 10 of the Schedule.

"C. Insurance as provided under this Section shall apply only to Aircraft for which a premium charge as set forth in Column 11 of the Schedule and Flight Risks are insured only in respect of such Aircraft for which a specific amount of deductible is set forth in Column 10 of the Schedule" (R. 44).

Section 1 of the Schedule reads:

SECTION 1

LOSS OR DAMAGE TO AIRCRAFT

Deductible "Flight Risks" Column 10	Premium Charge Column 11
$1250.00	$1750.00
PREMIUM	$1750.00
TAXES	$ 122.68
	$1872.68

The agreed value of the aircraft, as set out in Column 8 of the Schedule, was $25,000. (R. 43)

Section 2 of the policy, insofar as it appears material to this case, reads:

"SECTION 2—THIRD PARTY LIABILITY

"1. The Underwriters will indemnify the Assured, within the limits specified in the Schedule, against all sums which the Assured shall become legally liable to pay as compensation, including costs awarded to any claimant, caused by or through or in connection with the Aircraft described in the Schedule, or articles dropped therefrom, under that Coverage or those Coverages set forth herein for which specific limits of liability

corresponding both to Aircraft and Coverage are set forth in the Schedule for each such Aircraft.

* * *

"Coverage B—Property Damage: Loss from liability imposed by law upon the Assured for damage to or destruction of property (excluding property owned, rented, leased, in charge of or transported by the Assured), including the loss of use thereof, caused by accident.

* * *

"2. The Underwriters will, in addition, defend, until they elect to pay their limit of liability, in the name of and on behalf of the Assured any claim or suit, whether groundless or not, brought against the Assured and in respect of which the Assured is entitled to indemnity under this Certificate and/or Policy, provided that the Underwriters shall have the right to make such investigation, prosecution, negotiation, and settlement of any claim or suit as they may deem expedient; the Underwriters will pay all costs taxed against the Assured and expenses incurred by or with the consent of the Underwriters in defending such claims or suits, including interest accruing after entry of judgment on that part of the judgment not in excess of the limit of liability of the Underwriters." (R. 44)

Section 2 of the Schedule reads:

"SECTION 2—THIRD PARTY LIABILITY
LIMITS OF LIABILITY

Coverage A Public Liability (Excluding Passengers)		Coverage B Property Damage	Coverage C Passenger Liability		Premium Charge
One Person	One Accident	One Accident	One Person	One Accident	
Col. 12	Col. 13	Col. 14	Col. 15	Col. 16	Col. 17
$100,000	$300,000	$100,000	$10,000	$280,000	$2215.00
				Premium	$2215.00
				Taxes	155.05
(R. 43)					$2370.05

On Jan. 2, 1949, while the policy was in effect with all premiums fully paid, the insured aircraft crashed and burned in an attempted take-off at Boeing Field, King County, Washington, completely destroying the aircraft and all equipment and accessories attached to and forming a part of it except for salvage worth $390.20. The actual and agreed value of the aircraft was $25,000 (R. 9, 10, 29, 66, 68).

During the attempted take-off the insured aircraft crashed into a revetment hangar owned by King County, causing damage thereto for which the county filed a claim and brought suit against Leland's estate in the Superior Court of King County, Washington. Appellant administrator notified appellees of the filing of the claim and the commencement of suit thereon, but they refused to settle or defend it. The administrator then undertook the defense and notified appellees that they would be held liable for attorneys' fees and other

expense of defending the action. The case was tried and the Court rendered judgment against Leland's estate for $2,566.70 damages plus costs of suit (R. 30, 31, 66, 69 to 72, 126 to 131). In defending the action appellant administrator incurred $34.90 Court expense plus reasonable attorneys' fees. The parties have stipulated that $500 shall be the amount allowed as such attorneys' fees if the administrator is entitled to recover therefor (R. 67, 136).

Appellees refuse to pay anything on either claim. Before this suit was commenced they paid the United States $3,305.33 under Section 1 of the policy and Endorsement No. 6 (R. 8, 26).

The Court's opinion and the findings of fact show that it based its decision solely upon its finding that all of the damage to the insured airplane and the revetment hangar was proximately caused by Leland's negligence and failure to use due diligence in the operation of the airplane and that such negligence and failure to use due diligence violated Paragraph 3 of the general conditions of the policy (R. 76 to 79, 91, 92). That paragraph (hereinafter called "General Condition 3") reads:

> "3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories" (R. 44, 78).

QUESTIONS INVOLVED

1. Is the purpose and effect of General Condition 3 to exclude insurance coverage as to any loss or damage caused by the negligence of the Assured, or is it to prescribe the duties of the insured with regard to mitigating loss or damage and ensuring the safety of the aircraft in the event that it sustains damage?

2. If the policy were construed so as to exclude insurance coverage as to any loss or damage caused by the Assured's negligence, did the insurers sustain their burden of proving the affirmative defense of negligence?

3. Did the trial court commit prejudicial error in excluding testimony and offer of proof submitted by plaintiffs that other passenger-transport aircraft took off safely from the same airport and runway immediately prior to the crash, that the pilots thereof found runway and weather conditions to be safe, and that the pilot of the Assured's plane took off after regular clearance with the air traffic controller in the control tower?

SPECIFICATIONS OF ERROR

The District Court erred:

1. In making findings of fact numbered IX, X and XI (R. 91, 92) because the evidence does not sustain the finding that Leland was negligent or failed to use due diligence in the operation of the airplane, or that his negligence, if any, was a proximate cause of the damage to the insured property or the revetment hangar or violated any of the terms or conditions of the insurance policy.

2. In making its conclusions of law and judgment, holding that appellants are not entitled to any of the relief prayed for and dismissing their action with prejudice and without costs (R. 93, 94).

3. In excluding the testimony and offer of proof submitted by plaintiffs that other passenger-transport aircraft took off safely from the same airport and runway immediately prior to the crash, that the pilots thereof found runway and weather conditions to be safe, and that the pilot of the assured's plane took off after regular clearance with the air traffic controller in the control tower.

ARGUMENT

As Specifications of Error number 1 and 2 involve the same questions of law and fact we will argue them together.

We shall present argument under three headings, each corresponding to one of the three questions set forth above.

Under Heading I we shall urge that the effect of General Condition 3 was not to exclude coverage for loss or damage caused by the assured's negligence, but to prescribe certain duties of the assured in the event that the aircraft sustains damage.

Under heading II we shall examine the evidence and show that even if a condition making negligence a defense has been written into the policy, still the plaintiffs should recover because defendants failed to sustain the burden of proving their affirmative defense of negligence.

Under heading III we shall urge that the trial court committed prejudicial error in excluding plaintiffs' testimony and offer of proof relating to weather and air traffic conditions on the same airport and runway immediately before the crash.

We respectfully submit that the material presented under heading I should be sufficient to dispose of this case, but we offer argument under headings II and II for completeness.

I.

The Purpose and Effect of General Condition 3 is Not to Exclude Coverage for Assured's Negligence But to Prescribe Certain Duties of Assured In the Event of Damage.

The District Court interpreted the policy, particularly General Condition 3, so as to exclude coverage for any loss or damage caused by the negligence of the assured. We submit that this interpretation is untenable; that General Condition 3, when reasonably construed and related to the policy as a whole, has the purpose and effect of prescribing the duties of the assured with respect to mitigating loss or damage and ensuring the safety of the aircraft, in the event that it sustains damage.

An interpretation excluding coverage for negligence would defeat the primary purpose of the policy.

It is too clear for argument that the primary purpose of one purchasing such a policy would be to safeguard himself against the consequences of negligence, whether committed by himself or by his agents or employees. If the insured were certain that he and all others con-

cerned would be careful at all times, there would be far less sense in paying for coverage. This is especially true in a case like this, where the aircraft and the business connected with it must be handled by various agents or employees of the insured, and where any of a number of acts done or not done might be classified as technical "negligence."

Notice that the insuring clause, "Section 1, Loss or Damage to Aircraft" (p. 3 hereof) provides that

> "A. The Underwriters will pay for or make good accidental loss of or damage to the Aircraft whilst *in flight or on the ground* or on the water * * * *from whatever cause arising* except frost * * * but including *accidental* damage caused thereby." (Italics ours)

The assured paid $1872.68 each year for that coverage.

Under Section 2 of the policy entitled "Third Party Liability" (page 5 hereof), the coverage as to "Property Damage" is:

> "Loss from liability imposed by law upon the Assured for damage to or destruction of property * * * caused by *accident.*" (Italics ours)

The assured paid $2370.05 each year for that coverage.

Notice the sweeping language employed. There is nothing here to indicate that loss or damage caused by negligence of the assured was not covered. On the contrary, there is express reference to "accidental loss," and to loss by "accident." Everyone knows that most accidents are the result of some form of negligence.

Notice, too, that there is express reference to "accidental damage" caused by "frost." From what has been so far stated, and from all that follows in this case, it is clear that the negligence charged by the insurer consisted in taking the plane off with ice on the wings. We shall show later that this charge is not sustained by the evidence. Even if it were, the plaintiffs paid for that very coverage.

Appellees would not contend seriously that the word "frost," as used in Section 2 of the policy, would not reasonably be construed to include icing. See:

Webster's International Dictionary, "frost."

Funk & Wagnall's New Standard Dictionary, "frost."

Aalholm v. A Cargo of Iron Ore (D.C. N.Y., 1885) 23 Fed. 620.

Such a construction would completely nullify all coverage under Section I, the "Third Party Liability" insuring clause of the policy.

A decision construing General Condition 3 as excluding coverage for negligence under "Section 1, Loss or Damage to Aircraft" would have far-reaching effects upon all policies of aircraft insurance containing similar language. It would also affect insurance policies covering vehicles or any other property where similar language is employed.

Such a decision in effect would read "Section 2, Third Party Liability," out of the policy.

Section 2 requires the underwriters to indemnify the assured against claims of third parties for damages caused by the insured aircraft and to defend, until they

elect to pay their limit of liability, any claim or suit, whether groundless or not, brought against the assured and in respect to which he is entitled to indemnity under the policy.

Such liability exists only as to damage proximately caused by the negligence of the assured. But the trial court's construction of General Condition 3 absolves the insurer from any obligation to indemnify the assured or defend the third party action if the damage on which the claim is based was caused by the negligence of the assured.

The effect of this is illustrated by the fate of appellants' second claim, which is based upon appellees' refusal to pay or defend against the claim of King County. The county could establish its claim only by proof that Leland's negligence proximately caused the damage to its revetment hangar. Yet the District Court dismissed appellants' second claim on the ground that General Condition 3 relieved appellees from their obligation to pay or defend against the county's claim because the damage was proximately caused by the assured's negligence.

The coverage under Section 2, for which the assured paid $2,370.05 a year, is purportedly set out in "Schedule 2." It is: public liability, one person $100,000, one accident $300,000; property damage $100,000; passenger liability, one person $10,000, one accident $280,000 (R. 43). But if the District Court's construction of the contract is correct, appellees' only actual obligation under Section 2 was to defend groundless claims.

Can it be suggested that any sane person would have

purchased the policy if it had said plainly that that was the kind of coverage he was getting? Or that an honest insurer would have sold him a policy with a provision which it claims had that effect tucked away in an obscure "condition" apparently placed there for another purpose?

Courts consistently effectuate intent and purpose of policy as gained from entire instrument; any ambiguity is resolved against insurer, and absurdity avoided.

It is a dominant principle that an insurance contract will be construed to effectuate the purpose and intent of insurer and insured as gained from the entire policy.

> "In determining the intention of the parties to an insurance policy, the policy should be considered and construed as a whole, and if it can reasonably be done, that construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions. Seeming contradictions should be harmonized if reasonably possible. A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent."—29 Am. Jur. 176, *Insurance,* Sec. 160.

> "If the intention of the parties can be clearly discovered, the court will give effect to that intention within the sphere of its proper and legal operation and will construe accordingly the terms used in the policy, no matter how inept, ungrammatical, or inaccurate they may appear when

viewed strictly or legally.''—29 Am. Jur. 173, *Insurance,* Sec. 157.

A clumsy arrangement of words will not be allowed to contravene a reasonable construction according to the intention.

Wick v. Western Union Life Ins. Co. (1918) 104 Wash. 129, 175 Pac. 953.

"'If one construction of an insurance policy would involve hardship or absurdity or contradict its general purpose, this fact is strong evidence that such a construction was not intended by the parties, especially where it is open to a reasonable construction consonant with their general purpose'.''—*Hansen & Rowland v. Fidelity & Deposit Co.* (CCA 9) 72 F.(2d) 151, 155.

"Insurance contracts, like all other contracts, should be construed with reference to what the parties meant, when interpreted in the light not only of the language employed, but of the evident object of the contract, the benefits secured on one hand, the perils or risks sought to be avoided on the other. They should not be so construed as to work a forfeiture of either party's rights, or to defeat the very object of the contract for which a price has been paid, unless it plainly appears that such was the intention of the contracting parties, and that the effect of the language of the contract was well understood by them when the contract was entered into; and it ought in reason to be a sign to the court that there has been a misapprehension on the part of the contracting party whose rights are thus contracted away that the contract was not understood. Especially is this true in this character of contracts, where the language of the contract is the language of the insurance company

whose duty it is to see to it that, where unreasonable and one-sided provisions are incorporated into a contract, the contract is understandingly entered into."—*Port Blakely Mill Co. v. Springfield Etc. Ins. Co.,* 59 Wash. 501, 506, 110 Pac. 36, 38.

An insurance policy should not be given a construction that will end in an unreasonable or absurd result or that defeats the manifest intention of the parties and the very object and purpose they had in entering into the contract.

Rathbun v. Globe Indemnity Co., 107 Neb. 18, 184 N.W. 903.

It is submitted that there is no ambiguity in the policy before us, but if there were, it would be resolved against the insurer, under consistent holdings of the courts.

If a policy will fairly admit of two constructions, the one should be adopted which will indemnify the assured.

Fireman's Fund Ins. Co. v. Globe Nav. Co., (CCA 9) 73 F.2d 611;

Jack v. Standard Marine Ins. Co., 33 Wn.2d 265, 205 P.2d 351.

Equivocation and uncertainty, whether in the significance of the terms used or in the form and construction of sentences, are to be resolved in favor of the insured and against the insurer.

Allen v. Berkshire Mut. F. Ins. Co., 105 Vt. 471, 168 Atl. 698, 699.

If the insurer has couched the policy in such terms that a reasonable man could reasonably contend it ap-

plied to and covered a situation for which the insurer is sought to be held liable, the ambiguity will be resolved against the insurer.

> *Wright v. Aetna L. Ins. Co.* (CCA 3, 1926) 10 F.2d 281, 284.

Where a provision in an insurance policy is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning.

> *Kane v. Order of United Com. Travelers,* 3 Wn.2d 355, 100 P.2d 1036;
>
> *Doke v. United Pac. Ins. Co.,* 15 Wn.2d 536, 131 P.2d 436.

It is consistently held that conditions, exceptions and exclusions from coverage will be strictly construed against the insurer.

We have seen that, taken as a whole, a policy of insurance is to be construed strictly against the insurer, any ambiguity being resolved in favor of the insured. This principle is applied by the courts most forcefully as to any condition in the policy that might cause a forfeiture of the insured's rights.

> "It is a fundamental rule of the law of insurance that a stipulation in a policy which is in the nature of an exception to the liability of the insurer must be construed strictly against it, and that words of exception in a policy, if doubtful, are to be construed most strongly against the party for whose benefit they were intended. *Canton Ins. Office v. Woodside,* 90 Fed. 301, 33 CCA 63. If the company by the use of an expression found in a

policy leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company. *London Assurance v. Companhia de Moagens,* 167 U.S. 149, 17 Sup.Ct. 785, 42 L.ed. 113; *National Bank v. Insurance Co.,* 95 U.S. 673, 24 L.ed. 565. As said by Mr. Justice Harlan in the latter case:

" 'The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself'."—*Thomas v. Mersey Marine Ins. Co. v. Pacific Creosoting Co.* (CCA 9), 223 Fed. 561, 567.

Provisions limiting liability of the insurer—such as exceptions from coverage, exclusions, restrictions and conditions—are particularly deserving of strict construction so as not to cut down the coverage which the insured believed he was purchasing.

13 Appleman, Insurance Law and Practice, 106, Sec. 7405;

Glen Falls Ins. Co. v. Sherritt, (CCA 4, 1938) 95 F.2d 823.

One reason for this is that insurance policies are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured has no voice.

Guarantee Trust Co. v. Continental Life Ins. Co., 159 Wash. 683, 688; 294 Pac. 585, 587.

Negligence of the assured is covered in such a policy unless excluded by clear and explicit language.

It is uniformly held that it is no defense to a suit on a contract of insurance that the loss occurred through the negligence of the assured or his agent, unless the contract expressly makes such negligence a defense.

Rogers v. Aetna Ins. Co., CCA 2, 1899, 95 Fed. 103;

Wheeler v. Globe & Rutgers F. Ins. Co., 1923, 125 S.C. 320, 118 S.E. 609;

Terrien v. Pawtuckett Mut. F. Ins. Co., 1950, 96 N.H. 182, 71 A.2d 742.

"An overwhelming percentage of all insurable losses sustained because of fire can be directly traced to some act or acts of negligence. Were it not for the errant human element, the hazards insured against would be greatly diminished. It is in full appreciation of these conditions that the property owner seeks insurance, and it is after painstaking analysis of them that the insurer fixes his premiums and issues the policies. It is in recognition of this practice that the law requires the insurer to assume the risk of the negligence of the insured and permits recovery by an insured whose negligence proximately caused the loss."

Federal Ins. Co. v. Tamiami Trails Tours, (CCA 5, 1941) 117 F.2d 794, 796.

Insurance policies are taken out to guard against the results of negligence and carelessness.

St. Paul Fire & M. Ins. Co. v. Owen, 69 Kan. 607, 77 Pac. 544.

One of the principal objects which the assured has

in view in effecting insurance is protection against casualties accruing from these causes.

Rogers v. Aetna Ins. Co., supra, 95 Fed. 103.

Mere negligence of the assured in causing a fire or failing to extinguish it will not exonerate an insurer from liability. There must be willfulness in one or the other.

Home Ins. Co. v. Springdale Motor Co., 200 Ark. 893, 141 S.W.2d 522.

It is not a defense that negligence of the assured caused the loss, even though such negligence violated rules and regulations of a state authority.

Central Manufacturer's Mut. Ins. Co. v. Elliott, (CCA 10, 1949)), 177 F.2d 1011.

For a discussion of the origin of this doctrine and its application to policies insuring against perils of both sea and land see *Waters v. The Merchants Louisville Ins. Co.,* 36 U.S. 213, 9 L.ed. 691.

> "It is conclusively settled, in this country and in England, that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself."—*Phoenix Ins. Co. v. Erie and Western Trans. Co.,* 117 U.S. 312, 323, 29 L.ed. 873, 879.

The purpose and effect of General Condition 3 is to prescribe the duties of the assured with regard to mitigating loss or damage and ensuring the safety of the insured property in event the aircraft is damaged.

There are at least four reasons, which we will now discuss, why this construction should be adopted.

(1) With this meaning, condition 3 serves a useful and practical purpose, protecting the interests of the insurer without forfeiting the rights of the assured.

By Section 1-A of the policy (page 3 ante) appellees agree, subject to certain exceptions, to pay for or make good accidental loss of or damage to the aircraft while in flight or on the ground or on the water, including its equipment and accessories and including loss or damage by burglary, theft or malicious means. It is common knowledge that aircraft often sustain damage which grounds them in places where they would be subject to further damage from the elements and to loss or damage by burglary, theft or malicious means unless the owner or his agent is diligent in preserving and protecting them.

This interpretation leaves both insuring clauses in effect with coverage of the kind one buying such a policy is entitled to under the rules stated above. At the same time it protects the insurers by requiring the assured to use due diligence in doing everything reasonably practicable to avoid and diminish loss or damage to the insured property in event the aircraft sustains damage covered by the policy. Any breach of that condition would relieve the insurers from their obligations under the policy to the extent they were dam-

aged thereby. It is reasonable to assume that this was appellees' reason for putting Condition 3 in the policy.

(2) The language of Condition 3 is suited to requiring the assured to mitigate damage but would be inept if its purpose was to exclude coverage for negligence in operating the aircraft.

Neither the word "negligence" nor any reference to operation of the aircraft appears in the condition.

It is hard to imagine an insurer using the expression "do and concur in doing all things reasonably practicable" in a provision actually prepared for the purpose of requiring the assured to avoid operating the airplane negligently. Reasonable practicality is not a test of negligence nor a justification for negligence or want of due care where they are material factors. The language used in Condition 3 requires action—the doing of everything reasonably practicable. Negligent operation of the airplane could often be best avoided by inaction. The words "do all things practicable" are not suited to prohibiting action. They *are* suited to indicating the degree of care the assured is required to exercise in avoiding loss or damage after the insured property has been placed in jeopardy by damage to the aircraft.

The expression "diminish any loss of or damage to the property" also refers to what an assured would be expected to do after an event which caused loss or damage. One would not be expected to diminish loss or damage until some has occurred. "Avoid" is used with "diminish" and may reasonably be assumed to refer to the same thing—loss or damage to the *damaged* aircraft and its equipment and accessories.

Restricting the application of the verb "avoid" to the same type of damage that is specifically mentioned in other parts of Condition 3 accords with the rule that words of general import should be held to include only things similar in character to those specifically named. That principle is frequently applied in construing conditions, exceptions and exclusions in insurance policies strictly against the insurer and favorably to the assured so as not to cut down the coverage which the assured believed he was buying.

Allen v. Berkshire Mut. Fire Ins. Co., supra, 105 Vt. 471, 168 Atl. 698.

World F. & M. Ins. Co. v. Carolina Mills D. Co., 160 F.2d 826;

Rogers v. Aetna Ins. Co., supra, 95 Fed. 103.

Under no rule of construction could the condition be held to cover damage caused by negligence in operating the aircraft. That would do violence to the language used and defeat the very purpose of the contract. It must be given an interpretation most favorable to the assured. The meaning we have suggested is the one the assured would naturally give to Condition 3.

The language of an insurance policy is to be given the meaning which the one using it apprehended or should have apprehended that the other party would give to it. The common or normal meaning of language will be given to the words employed, unless the circumstances show that in a particular case a special meaning should be attached to them. A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words.

Jack v. Standard Marine Ins. Co., 33 Wn.2d 265, 271, 205 P.2d 351, 354.

(3) The language relied upon to exclude insurance against negligence is in a part of the policy where it would not suggest that meaning to the assured.

The language which appellees claim accomplished the above purpose does not appear in the "General Exclusions" nor among the exceptions and exclusions mentioned in the insuring clauses. Those are the places where one would naturally look to see what risks are covered or excluded.

It is not suggested anywhere in the general exclusions or in the insuring clauses that the policy does not insure against loss or damage caused by the assured's negligence. The language of the insuring clauses clearly includes such coverage. The words relied upon to take it away are part of a sentence constituting one of ten "General Conditions."

Those conditions, taken in order, deal with the airplane's papers and records; mitigating damage and ensuring safety of damaged aircraft and its equipment and accessories in event it sustains damage covered by policy; giving notice and furnishing information and assistance in connection with actual or possible claims; admission of liability by assured; subrogation on claims paid by insurers; bankruptcy or insolvency of assured; liability for rewards offered; voluntary cancellation of policy by either party and refund of premiums; false claims by assured; and policy assignments, waivers or changes. (R. 44)

None of the ten general conditions mentions or refers

to negligence or lack of due care in operating the plane, unless such reference may be inferred from the first part of Condition 3.

One procuring insurance could hardly be expected to search through such material for an inference that might cut down or completely nullify the coverage that was his only object in buying the policy.

(4) Appellees' construction of Condition 3, which is their entire case, depends upon the location of one word, "AND," in this condition.

In interpreting a contract words may be transposed to make meaning clear and carry out intent of parties.

Libby, McNeil & Libby v. Busse (1926) 138 Wash. 548, 244 Pac. 963;

Rogers v. Aetna Ins. Co., 95 Fed. 103, *supra.*

We do not think there is any real need for that in this case. General Condition 3, when construed with the policy as a whole, clearly and unequivocally shows that its purpose and intent are not to exclude coverage for the assured's negligence, but to require the assured to mitigate damages and ensure the safety of the insured property in event the airplane sustains damage.

The only thing in the sentence which even suggests any other meaning is the location of the second "and." Any uncertainty or lack of clarity can be completely eliminated by transposing that one word. If we place the "and" after the phrase "in the event of the aircraft sustaining damage covered by this certificate and/or policy," instead of before it, General Condition 3 reads as follows:

"The assured shall use due diligence and do and

> concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured * * * in the event of the aircraft sustaining damage covered by this certificate and/or policy, *and* the assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged aircraft and its equipment and accessories."

With this slight transposition any ambiguity in the sentence as originally written disappears. The manifest intention of the parties is carried out. The condition has a meaning that is clear, complete and consistent with itself and with all other parts of the policy. It deals with a single subject, accomplishes a legitimate purpose, and protects the interests of the insurers without annuling or limiting the insurance coverage which the assured must have thought, and had a right to assume, he was getting when he bought the policy.

***Rogers v. Aetna Ins. Co., Supra* (CCA 2) 95 Fed. 103, Applies the Foregoing Principles.**

The case just cited summarizes the principles which apply in this situation better than we could.

The Aetna Insurance Company had insured the owner of a steam tug against such loss or damage as the tug might "become legally liable for from accident caused by collision." While the policy was in effect the tug collided with a yacht and caused it to sink. Two persons aboard it were drowned. A suit followed in which it was adjudged that the owner of the tug was liable for the collision and the damages and injury resulting therefrom to the extent of his interest in the

tug. He then filed a libel against the insurance company to recover the loss insured by the policy. The policy contained the following:

> "Warranted by the assured that the said steam tug, with her tow, shall not go out of the regular and usual channels, and also warranted free from loss, damages, or expense caused by or arising from so doing, or from ignorance on the part of the master and pilot as to any port or place the steam tug may use, or from want of ordinary care or skill."—Ibid, page 105.

It was insisted by the insurance company that there was a breach of the warranty against loss arising "from want of ordinary care or skill."

In disposing of that contention the Circuit Court of Appeals said:

> "It is no defense to a contract of insurance that the loss occurred through the negligence of the assured, or of his servants, unless the contract expressly constitutes such negligence a defense. One of the principal objects which the assured has in view in effecting an insurance is protection against casualties accruing from these causes.
>
> * * *
>
> "The collision undoubtedly occurred through want of ordinary care or skill, and, if it is the meaning of the policy that the insurance company shall not be liable in any such case, the proofs establish a defense. But this warranty is found in a contract which has no other purpose than to indemnify the assured against the loss which he may sustain through the improper navigation of his own vessel, and, as such loss cannot arise in any other way or from any other cause than the want

> of skill or care of those in charge, the contract would be of no value to him, and would be nugatory as to the insurance company, if the warranty is given the effect claimed for it. It was probably inserted where it is found with the purpose, on the part of the Aetna Insurance Company, of escaping any liability in the event of a loss, if it should see fit to do so. But it is inserted in a part of the policy where it would not naturally convey that meaning to the assured. It is made part of a comprehensive warranty expressed to exonerate the insurance company against the risks that may intervene, if the tug, with her tow. is taken out of the regular towing channels, or to any port or place where the master or pilot, through ignorance or inexperience, ought not to undertake her navigation. Upon no rule of construction can it be permitted to extend to defeat the whole end and aim of the contract. It must be given an interpretation most favorable to the assured. We construe it as though it read 'warranted free from loss arising from ignorance or want of ordinary skill or care on the part of the master or pilot as to any port or place the steam tug may use'.''—Ibid, page 105.

It seems clear that if appellees had sustained the burden of proving that Leland's negligence caused the loss, it would be no defense in this case.

II.

Defendants Would Be Liable Even If A Condition Covering Negligence Had Been Written in the Policy.

For purposes of analysis let us assume that a condition covering negligence, which defendants would read into the policy by implication, actually had been set

forth in plain words therein. Let the provision read somewhat as follows:

> "The insured, his agent and employees, shall exercise due care in the operation of the insured aircraft, and if the aircraft shall be operated by anyone in a negligent manner the insurer shall not be liable for any loss or damage caused thereby."

We have noted that coverage for negligence is implied by the use of the words "accident" and "accidental" in both Sections 1 and 2 of the policy. Let us therefore insert an additional provision, in order to eliminate contradiction or ambiguity:

> "Wherever the word 'accident' or 'accidental' occurs in this policy such words shall be deemed to refer to accidents wherein the insured, his agents or employees, or anyone operating the aircraft has been exercising due care to prevent such accident."

With the foregoing changes made in the policy, it is submitted that defendants still would be liable upon the record presented herein. One reviewing carefully the evidence relating to negligence will observe that the essential facts are uncontroverted. Therefore, no legal principle favoring factual determinations of a trial court presents any barrier to the review of the facts upon their merits by this court.

Where an insurance company seeks to prove noncompliance by the insured with a condition or warranty in a policy, so as to cause a forfeiture of the insured's rights thereunder, the company must establish such proof by clear and convincing evidence. This is so because of the judicial disfavor of forfeitures of insurance policies, to which we have referred.

> * * * "Similarly there must be a preponderance of the evidence on the question whether there has been a breach of warranty or condition such as to justify insurer in forfeiting the policy or defeating a recovery; *and, as a forfeiture is not favored, the facts on which it is based must be strictly proved, and it will not be enforced on mere inference.*" (Italics ours). 46 C.J.S. 514, Insurance, § 1353.

The foregoing quotation applies forcefully to the instant case because the evidence submitted by defendants will be found to turn upon persons' opinions, which upon scrutiny amount to pure speculation. The persons who could give an account of what occurred in the cockpit of the airplane all were killed. They were: Mr. Chavers, the pilot, the co-pilot and Mr. Leland, the insured.

What Was the Cause of the Crash? Insurers Tried But Failed, to Establish It.

It must be kept in mind constantly that defendants alleged negligence as an affirmative defense and undertook the proof of it. They recognized throughout the trial that an indispensable part of such proof was the establishment of the cause of the crash that caused the loss or damage involved herein. Yet a careful reader of the record will see that defendants failed entirely to prove what that cause was.

The only finding made by the trial court on this subject reads as follows:

"IX.

"That William F. Leland, the assured, and the

> owner of the insured aircraft, personally failed to use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-of from Boeing Field in that *said Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to* attempt to take off in flight *in dangerous weather conditions* and *when said insured aircraft had an accumulation of ice, snow and frost on the upper surface of its wings and fuselage and had icicles hanging to its under surfaces,* which conditions materially impaired the lifting qualities of its wings." (R. 91-92; italics ours)

Notice that this finding is to the effect that the crash was caused by the insured's attempting a take-off (1) in "dangerous weather conditions" when (2) there was ice on the airplane.

With regard to (1) the weather condtions, the undisputed testimony is: that the weather on the evening of January 2, 1949, was very variable (R. 154). At the time of the crash, 10:07 P.M. (22:07 on the "24 hour clock") the visibility was one-quarter mile (R. 155). The temperature was freezing, and small ice crystals were forming on objects (R. 154-155). There was ground fog on the field in places but there was no ceiling; that is to say, one could look upward and see the sky and stars without clouds, but with "thin obscuration" (R. 160).

Testimony relating to take-offs safely made from the same runway by other passenger-transport aircraft was excluded by the trial court, as well as a comprehensive

offer of proof on this and related matters. This will be reserved for consideration under a following heading. It is our position, however, that defendants failed to meet the required standard of proof of their affirmative defense of negligence wholly without reference to this testimony and offer of proof which the trial court rejected.

A statement couched in general language that "dangerous weather conditions" existed is not explanatory of the cause of a crash. It is common knowledge that wind, fog or ice very frequently are encountered by aircraft, particularly during winter months, and that any such condition could be regarded as "dangerous" if the aircraft were not operated competently. It is also common knowledge that instruments and equipment are installed in aircraft to meet such conditions, and that thousands of flights proceed safely therein; that planes, like trains, cannot confine their travel to fair weather.

Let us then proceed to the second matter referred to by the trial court in its findings, namely icing.

Left Turn of Plane on Runway Is Unique Feature of Accident, Requiring Explanation.

The defendants relied upon the theory that ice on the airplane caused the crash and the trial court's finding above referred to is really based upon that view of the accident.

Now, a unique and dominant characteristic of the plane's behavior just prior to the crash must be kept in mind by anyone offering any theory as to its cause.

The runway at Boeing Field extends generally in a northerly and southerly direction. It is about 7500 feet long (R. 522). The plane commenced its take-off run from the North end. Then, the tracks left on the runway by the plane make it clear that two things occurred: (1) During the first 1000 feet of the take-off run the plane proceeded "in a comparatively straight line" down the center of the runway. (2) *From that point a distance of* 800 *feet, the plane described a curve to the East, or left of the runway. At a point* 1800 *feet from the North end of the runway the plane was at the extreme left edge thereof,* from which point it became airborne a short distance. It then landed and crashed into the revetment hangar. This revetment is located to the East of the runway and about 5000 feet South from its North end (R. 520-523).

It is a matter of common knowledge that the pilot of any plane attempts to proceed in a straight line down a runway; that it is dangerous to leave the runway at an angle if for no other reason than risk of collision. Veering to the left edge of the runway is a unique feature of the accident in question. It is obvious that unusual things leading to the crash began to happen *when the veering or turning to the left began.* Consequently, any explanation of the accident must be directed to this dominant feature.

The Testimony of Defendants' Principal Witness, John O. Vineyard, Jr., Relating to Cause of Crash, Narrows Down to Icing.

The principal witness of the defendants on the cause

of the crash was Mr. John O. Vineyard, Jr. On direct examination he testified:

> "Q. What do you consider caused the crash?
>
> "A. Weighing all the evidence I have heard, and what I examined myself, I say between pilot proficiency and the icy conditions and possibly the overloading of the air plane that caused the crash" (R. 327-328).

Elsewhere he said further, under examination of his own counsel:

> "MR. MATTHEWS: Of these three things which one do you think got the airplane in trouble in the first instance?
>
> "THE WITNESS: It has always been my opinion that the *icy conditions on the airplane did*" (R. 533).

The two matters other than icing referred to in the first of his statements, above, must be disregarded. Testimony to the effect that a cause was "possibly" overloading merits no weight as proof of the actual cause of the accident.

The witness negates "pilot proficiency" as a cause of the crash elsewhere in his testimony. The witness and the pilot of the airplane, Mr. Chavers, had taken their flight training together in 1940, and the witness did not know of any accident in which Mr. Chavers had been involved since that time except the one in this case. He regarded Mr. Chavers' ability as average. Mr. Chavers' reputation for dependability, for "the discharge of all his piloting functions," was "very good." Also "very good" was his reputation for observance of all duties and regulations (R. 334). As to

Mr. Chavers' reputation for caution the witness testified:

"Q. What was Mr. Chavers' reputation for being a cautious pilot?

A. Very cautions" (R. 334).

The witness testified further as to Mr. Chavers' pilot proficiency:

"Q. Just a word more about Mr. Chavers' pilot proficiency. He had an instrument rating?

A. Yes, sir.

Q. Would you tell the Court just briefly what an instrument rating is?

A. An instrument rating is a rating that is issued by the Civil Aeronautics Administration for proficiency, to establish the proficiency of a pilot flying on actual instrument conditions.

Q. As far as you know, he was certified in every respect as a proficient pilot?

A. As a proficient pilot to his ratings, yes, sir.

Q. And his ratings covered the matter of flying a DC-3 type aircraft?

A. Yes, sir" (R. 338).

Mr. Vineyard Explains, Then Renounces, His Theory That Icing Caused the Crash.

Mr. Vineyard was conscious of the necessity of explaining why the airplane veered to the left on the runway just before commencing flight. In short, he advanced the following theory: The left wing "stalled," because of a larger amount of ice on it than upon the right wing. A plane moving down the runway, then later in flight, is propelled by a force called "lift" which is generated by the flow of air forced by the

propellers over its wings. For this flow to continue effectively, the surface of the wing, particularly the upper surface at the front or "leading" edge, should be smooth. The presence of ice in appreciable quantities would cause a "burbling" or turbulence in the airflow (R. 319-320). If there is "much obstruction" on the wing (R. 319) it would lose its lift or efficiency so as not to fly at a given speed, in which condition it is said to "stall" (R. 320). If the opposite wing, the right in this case, is free of the obstruction it would pull the airplane forward on that side more, causing the plane "to swerve to the left" (R. 321, 328).

This theory assumes (1) that there was ice on the left wing in sufficient quantity to cause it to "stall," and (2) that there was no ice on the right wing sufficient to have that effect; i. e., if both wings stalled there would not have been the turning or veering effect described.

Then notice the clear abandonment by this witness of the theory that the crash was caused by the left wing's stalling:

> "Q. You stated a while ago that if there was a good deal more ice on the left than on the right side of the wing, you might have a wing stall?
>
> A. That is right, if there was ice.
>
> Q. But if the ice was equally on the left and right wing, that would not be the case?
>
> A. That is right.
>
> Q. You don't know whether there was more ice on the left than on the right wing, do you?
>
> A. From my knowledge, no sir, because I didn't inspect [200] the top surface of the right wing.

Q. So that you have no knowledge at all as to whether there was more on one than on the other?

A. That is correct" (R. 338).

With regard to the bottom surfaces of both wings, he had testified only a few minutes previously:

"Q. As far as the bottom side of the wings is concerned, did you notice any difference on either wing?

* * * *

A. No, I would say that they were both pretty well the same [197]" (R. 335).

Mr. Vineyard Had Not Examined the Airplane Sufficiently to Express Any Opinion on Icing.

Mr. Vineyard went over to the airplane in the dark, while it was parked at the end of the runway prior to take-off. He had no flashlight and did not see the under-surface of either wing at all. What he did was to feel with his hands while standing under the wing. He went over "about 20 inches near the wing tip" in this way (R. 335). He found a "very small icicle, possibly a quarter of an inch, from one-eighth to one-quarter inch long" on the rivets that he touched (R. 316). "This was clear ice caused from water-vapor that has formed on the rivets, which dripped down and froze when it dripped down, caused the icicle" (R. 336). Mr. Vineyard apparently placed no significance upon the presence of these minute icicles.

He did not see or feel the top surface of the right wing (R. 336).

His examination of the top surface of the left wing consisted in looking at it with the aid of what light

was available from a parked automobile (R. 336). Not only Mr. Vineyard but other witnesses of defendants base their opinions upon his testimony as to what he observed of the left wing of the airplane, so it is important to note carefully what he claims to have seen. Under examination by his own counsel he said:

> "Q. What did your examination of the top of the left wing disclose?
>
> A. Several *spots* of accumulated ice and heavy frost on the leading sections, up near the leading edge of the left wing, and several *spots* of rough ice along the middle of the wing.
>
> Q. Can you give the Court some idea of the extent and size of these spots, and their condition as to roughness or smoothness?
>
> A. *I can't recall just how large they were,* but they were oblong spots, and *I don't think I could fairly estimate how big they were, maybe* from six inches to eighteen inches; some of them *maybe* six inches across, some *maybe* eighteen [177] inches long" (R. 317).

Notice particularly that in answering this question as to the "extent and size" of the "spots," the witness states outright that he "can't recall," that he could not even "fairly estimate how big they were." *He uses the word "maybe" three times in referring to their size.*

He does not even refer to the vital point as to how thick, or deep the spots were, i.e., whether a small fraction of an inch or more than that.

We have seen that his theory relating to the stalling of the left wing turned upon their being sizeable quantities of *rough* ice thereon. Yet, when his counsel asked

him, above, to give the court "some idea of the condition as to roughness or smoothness" the witness fails to answer the question at all. He had testified that the ice on the under surface was smooth, not rough (R. 336-337).

The witness continues with his testimony:

> "Q. How many spots would you say there were on the top of the left wing in the places you have indicated?
>
> A. *Probably* four or five.
>
> Q. *What percentage of the surface of the left wing would you say was covered, to the best of your judgment,* with the spots of rough ice and frost?
>
> A. That is very hard to put it in percentage, *because I didn't make that close an inspection of how much the ice covered the wing.* From standing on the ground and feeling as far as I could, and from the lights of the car shining up on the wing, I could just see the tops of rough places that I observed. *I did not examine the wing on top like I did on the bottom"* (R. 317, 318).

What does this mean? The witness implies that the inspection he made of the upper surface by means of eyesight was not as good as the one he had made of the lower surface by feeling in the dark. He did not make a sufficiently close inspection, apparently, to say whether the top surface was covered nearer 1% than 100%, despite an inclination to make "maybe" estimates in his earlier testimony, above.

Testimony of Messrs. Miner and Flood as to Presence of Ice.

The person who actually worked on the plane to remove the ice was Mr. Douglas Miner. Mr. Miner was an independent operator of an aircraft maintenance business on Boeing Field who performed services for various operators of aircraft (R. 450-451). He had been engaged by Mr. Leland during the afternoon of the accident to remove the ice and snow from the plane's surfaces. First he washed the plane off with water, finishing about six o'clock P.M. (R. 451).

He began the further operation of washing the plane with alcohol at about 8:30 or 9:00 P.M. (R. 452). He did this work with the help of Mr. Chavers and Mr. Leland (R. 451). *They completed the ice removal only five or ten minutes prior to the plane's taxiing to the runway for take-off.* He used isoproply alcohol, a liquid that "everybody uses in connection with ice removal." (R. 452). He testified:

> "A. We took ordinary floor mops and dipped them in this alcohol and scrubbed the wings with it. That scrubs off the ice already there and makes the surface so that ice won't form on it so readily again [309].
>
> Q. Did you go all over the wings?
>
> A. All over the upper surfaces of the wings and tail surfaces.
>
> Q. Tell us what condition the aircraft was in with respect to presence of ice, if any, when you got through with your operation?
>
> A. *The upper surfaces, as far as I could see, were free from ice. Mr. Leland and Mr. Chavers seemed to be of the same opinion"* (R. 452, 453).

The court ruled that Mr. Miner's reference to Mr. Leland and Mr. Chavers in the last sentence should be stricken. We submit that this was a proper part of Mr. Miner's testimony, especially since defendants, through another witness, had put in issue Mr. Chavers' knowledge of ice on the airplane (R. 352).

The only other testimony relied upon by defendants to establish icing was offered by Mr. Flood.

The vital point may well have been overlooked by the trial court, that Mr. Flood made his observations *before Mr. Miner's removal of ice with alcohol,* as above set forth. He made his observations of the aircraft at about 7:00 o'clock P.M. (R. 186). By about 7:30 he had left the airport (R. 191). Before leaving, he advised the use of isopropyl alcohol to remove ice he had observed on the wings (R. 190). Defendants made much of the circumstance that Mr. Leland rejected this suggestion at that time. Even if this were a fact it would be immaterial if, as is undisputed, Mr. Leland ordered the removal of ice with this alcohol *after Mr. Flood's departure.* As noted in the testimony of Mr. Miner, summarized above, this operation did not commence until about 8:30, about an hour after Mr. Flood left the airport. The testimony of Mr. Miner is undisputed.

Remaining Opinion Testimony of Defendants as to Effect of Ice on an Airplane.

Mr. Flood, who was a pilot for the Flying Tiger Line (R. 197), offered his expert opinion on the effect of the presence of ice on an airplane. His opinion was that the lift of an airplane's wing would be "completely

destroyed," even though there were only "a few specks of frost" thereon. Here is the testimony:

> "Q. Even though there were just a few specks of frost, still the lift characteristics of the wings would be completely destroyed?
>
> A. That is correct" (R. 195).

The value of such testimony may be left to the reader's judgment without further comment.

Another witness called by defendants on the matter of icing was Mr. Victor M. Ganzer, an instructor in aerodynamics at the University of Washington and an employee of the National Advisory Committee for Aeronautics (R. 343). He had made tests in wind tunnels concerning the effects of foreign substances such as icing on air foils. Apparently lacking ice itself for test purposes, he had glued carborundum dust to the leading edge of a model wing (R. 345) "in the first ten feet of the wing upon the top surface, on the leading edge" (R. 346). He then placed the model in a wind tunnel for observation (R. 346). He had made no experiments with the DC-3 type of aircraft, involved in this case, and had made no study of the accident at all (R. 355).

The witness was asked to express an opinion upon the basis of facts set forth in a long, hypothetical question (R. 349-351). The assumed facts with respect to icing are drawn from what defendants' counsel supposed that Mr. Vineyard had covered, referred to above. Mr. Ganzer was to assume that "there was an accumulation of rime ice and frost in patches approximately six inches wide and 18 inches long spotted

irregularly across the surface of the left wing'' of ''an airplane'' (R. 349). Notice that Mr. Vineyard had testified at most that there were ''probably four or five spots,'' not that the spots were ''across the surface of the left wing.'' We have noted that Mr. Vineyard did not testify whether the ice was ''rime,'' i.e., rough (rather than smooth) ice; he had not answered that very question put to him by defendants' counsel (R. 317).

Mr. Ganzer did testify that the existence of minute particles on the rivets on the under surface would not be very serious. He makes this statement even on the assumption, apparently, that such icicles existed on all the rivets rather than upon those within the ''20 inches'' of the wing that Mr. Vineyard had examined (R. 351-352).

Mr. Ganzer indicated that in his wind-tunnel tests there must be ''five or ten per cent of the surface between the leading edge'' covered; he regarded this percentage ''as a very small portion,'' below which adverse effects would not be expected (R. 354). Yet Mr. Vineyard when asked the question as to percentage of ice coverage which he had observed on the insured's plane had said outright that he did not know. Mr. Ganzer did not indicate the *thickness* of the carborundum in his wind-tunnel tests, nor whether he regarded that circumstance (i.e., whether the ice was a fraction of an inch, or several inches thick) as pertinent.

Mr. Ganzer's opinion then came down to this:

> ''When taking off, *if* the pilot tried to take an airplane off at a speed which he was used to taking

that airplane off, *if* he took off by an air speed indicator and *if* he had ice on the wings *and* did not know what the effect of that ice was going to be *and* did take off at that speed *and* pulled the airplane up to take off, he would find that the lift was not sufficient" (R. 352).

It is plain that the opinion of this witness is characterized as much by the number of "ifs" and "ands" as was the testimony of Mr. Vineyard, above, by the number of "maybes." Again, *there is an absence of factual basis for any of the series of assumptions referred to by the witness.*

The only remaining witness who testified as to the cause of the crash was A. Elliott Merrill. He is a graduate engineer in charge of the flight test section at the Boeing Airplane Company, with considerable experience in the flight characteristics of commercial and military aircraft (R. 357). Counsel for defendants asked an opinion from Mr. Merrill "assuming that the condition of the airplane and the weather was as stated by Mr. Vineyard" (R. 359). Mr. Merrill was also asked to assume the conditions as to "the load" (R. 360); presumably this refers to the overload which Mr. Vineyard testified "possibly" was one of the causes of the crash.

Mr. Merrill's connection with the accident was confined to sitting in court and hearing such testimony during the course of one afternoon (R. 360).

Mr. Merrill testified:

"Q. Would you be able to formulate an opinion as to the cause of the crash?

A. Yes.

Q. What is your opinion?

A. My opinion is that the airplane never reached a safe flying air speed.

Q. Why did it not?

A. *My opinion there would be that the pilot attempted to fly the airplane at too low an air speed. He did not have a proper air speed to fly the airplane under the existing conditions.*

Q. By the existing conditions, you mean the ice and weather *and the load?*

A. Yes, sir'' (R. 360).

The foregoing statement at most is to the effect that there was an error in pilot judgment, in attempting ''to fly the airplane at too low an air-speed.'' Since Mr. Merrill did not see the airplane take off, his judgment on air-speed would have to be based upon the testimony relating thereto offered by some other witness. Yet no witness in the entire record offered any estimate as to what the air-speed was. Furthermore, it is clear from the foregoing that Mr. Merrill was asked to give his judgment regarding air-speed with relation to the testimony of Mr. Vineyard as to ''the ice * * * and the loading.'' We have seen that neither Mr. Vineyard nor anyone else gave any definite testimony as to what ice there was on the airplane. Under the next sub-heading hereof we shall show that Mr. Vineyard (and all other witnesses of defendants) failed to give any definite testimony on the load, also.

Notice especially that neither here nor anywhere else in the record does Mr. Merrill state that the presence of ice caused the crash. By implication he negates such a theory.

Mr. Merrill was asked specifically, on cross-examination, as to how the presence of ice could account for the plane's veering left off the runway. He testified that even if one assumed a large quantity of ice on the wings, that could not explain the left turn unless it is assumed (which the evidence does not show) that there was appreciably more ice on the left than on the right wing (R. 361-362).

> "I would put it this way, the ice on the wing, if it was uniform, would have no effect on rudder effectiveness" (R. 362).

There Was No Proof That There Was Any Overloading.

The suggestion that there was overloading of the plane was made repeatedly by defendants' counsel, in the form of questions put to witnesses and in argument.

Yet *no witness offered any opinion that the plane was overloaded or that the crash may have been due to overloading except* Mr. Vineyard, who said that this was "possibly" so. The trial court made no finding on this matter.

Furthermore, even if overloading were assumed, there was no showing that it would account for the turning of the aircraft to the left of the runway. On the contrary, Mr. Merrill himself testified in this clear-cut fashion on cross-examination:

> "Q. Assuming that a plane was overloaded by two tons, to take an extreme case, would there be anything in that situation that would cause it to lose its right and left directional course if the rudder control were available?
>
> A. No, I don't believe so.

Q. In other words, overloading has nothing to do with keeping a plane on the course of the runway?

A. Generally, no'' (R. 361).

There admittedly were no more than the permitted number of persons aboard the plane. Defendants sought to establish overloading by proving the weight of (1) fuel and (2) baggage aboard.

(1) Defendants attempted to arrive at the weight of fuel aboard at the time of take-off by the following steps:

(a) The pilot, Mr. Chavers, had filed a flight plan for the flight in which he had estimated the hours required for its completion at six (Def.'s Ex. A-14, R. 416).

(b) Although this plan was filed at 6:57 o'clock, about three hours before the take-off (R. 446-447), defendants assumed that Mr. Chavers proceeded in accordance therewith later.

(c) Mr. Vineyard is called upon again to testify that it is common practice among pilots to carry one hundred gallons of fuel for each hour of intended flight. He then rushes in where psychologists fear to tread, giving his expert opinion as follows:

''Q. Have you any opinion as to whether or not he (Chavers) might have had the same idea in mind in filling it (the flight plan) out?

A. Yes, sir. I would say he would say 600 gallons. He would be assured of 600 gallons aboard'' (R. 333).

(d) From the foregoing defendants then would draw

the conclusion that there were 600 gallons of gasoline aboard the plane on take-off. They would establish overloading, and cause a forfeiture of plaintiff's insurance policy, simply by multiplying 600 gallons by the average weight per gallon of gasoline.

Mr. Vineyard himself repudiated such a conclusion. He explained that the number of gallons consumed per hour in a particular engine varied considerably, and that he would not undertake to tell the court that this particular plane did or did not burn a stated number of gallons per hour (R. 340). He said also that he could not tell how much weight there was in the airplane (R. 339). He testified further:

> "Q. * * * so that actually there is no basis so far in anything that you have heard in this case, apart from what you have heard in other cases, that would be a basis for any honest, reliable judgment that there was any overloading, isn't that true?
>
> A. The latter part of your statement there, I would like to understand that better, about halfway through your statement.
>
> Q. To simplify it—
>
> A. Did you say this case or any other case?
>
> Q. This case alone [202].
>
> A. That is correct, I haven't" (R. 339-340).

(2) Data as to the weight of the baggage on the plane was not available. However, defendants offered testimony on this point that is noteworthy for its uniqueness if for nothing else. They sought to qualify student passengers on the airplane as experts to testify as to the weight of baggage which they had seen, but had not weighed or even lifted. They were to do this with

no indication of what the baggage contained. The following is a typical question put by defendants' counsel:

> "Q. For example, from the size and general appearance of baggage, could you form an opinion as to its probable weight without actually weighing it?
>
> A. Yes, approximately, yes" (R. 379).

There Was No Evidence That Fog Caused the Accident.

Many pages of the record were utilized by defendants for the purpose of showing that there was fog on various parts of Boeing Field on the night in question. Not a single witness, however, testified that in his opinion fog was the cause of the crash. Nor could there be such a witness. Several distinct reasons would make that hypothesis untenable:

(1) The fact is undisputed that the visibility was one-quarter mile at the time of the take-off (R. 155). This would be 1320 feet, or 440 yards. Where would there be a witness who would testify that a pilot could not keep his plane aligned on the runway with that much clear distance ahead? The fact is, that Mr. Chavers kept the plane on the center of the runway for the first 1000 feet (R. 520-521). The presence of fog is no explanation of the plane's turning to the left during the next 800 feet of its travel.

(2) It is the visibility *to the pilot* from where he was ready for take-off that would be important in determining whether restricted visibility had anything to do with the crash. Mr. Miner happened to go up into the cockpit of the airplane "while the passengers were

loading." He testified as to visibility from that point of observation as follows:

> "Q. What was the condition as to visibility at that time?
>
> A. At that time the cockpit was high enough so that you could look over the top of the fog and see lights all over the city and *see the boundary lights on the south end of the field,* see all the lights on the administration building.
>
> Q. The fog then was low-lying ground fog, is that about it?
>
> A. Yes" (R. 454).

Defendants called upon Mr. Vineyard again, to testify that he drove in an automobile with Mr. Miner along the side of the runway just after the take-off and had great difficulty seeing his way (R. 322-327). Such testimony would not contradict that of Mr. Miner, above set forth, because it is common knowledge that the pilot's cockpit in a D-C airplane, or in any other transport airplane, is some feet higher above the ground than the driver's seat in an automobile.

It is to be noted that Mr. Vineyard was asked the question, "What do you consider caused the crash?" immediately after his description of fog and visibility conditions (R. 327). It is very clear from his answer, to which we have referred above, that he himself eliminated fog as a causal factor when he said: "Weighing all the evidence that I have heard, and what I examined myself, I say between pilot proficiency and the icing conditions and possibly the overloading of the airplane that caused the crash" (R. 327-328).

The weather observer called by defendants explained

that her observation of visibility as "one-fourth mile" was made *from the Control Tower,* and that she "did not know what the condition was as to visibility from the north end of the runway looking south" (R. 154).

Mr. Robert H. Wiley, the Airport Traffic Controller (R. 163), confirmed this. He testified that in the performance of his duties he had found it not unusual that a pilot could see the full length of the runway at times when visibility was restricted in the tower. He explained that Boeing Field is peculiar in this respect, because of special fog and contour conditions there (R. 167, 168, 169).

(3) Even if it were assumed that there was so much fog on the take-off that the pilot could not see the ground, there is no testimony that would support the conclusion that the take-off under those conditions would not be safe. Mr. Chavers was a properly certificated instrument pilot, and held a valid rating for instrument take-off in the particular type of aircraft he was flying (R. 338). Richard R. Crooks, a captain employed by United Air Lines, with wide experience (R. 469-470) defined an instrument take-off as one "entirely by instruments" with no visual reference to the ground (R. 470-471). He testified:

> "Q. Assuming that a pilot is proficient in instrument procedure, is an instrument take-off a safe procedure?
>
> A. I would say it would be as safe as a normal take-off" (R. 472-473).

It is true that his particular company had a rule in effect prohibiting instrument take-offs when passen-

gers were aboard, but such a circumstance does not affect the foregoing testimony, which was undisputed.

The Evidence Supported Alternate Possible Causes of the Crash, Which Were Not Excluded by Defendants.

The form of the hypothetical questions put to witnesses by defendants' counsel had the effect of excluding automatically alternative possible causes of the crash. The questions were couched in such terms that the proper functioning of engines, instruments and accessories was to be taken for granted by the witness. Typical is the question put to Mr. Merrill, whose only connection with the crash was sitting in the courtroom the previous afternoon (R. 360):

> "Q. *Assuming the facts* assumed in my previous question *with respect to the weather and condition of the airplane; and assuming that during the attempted take-off the motors of the airplane sounded as though they were operating normally; and that after the crash* and fire of the airplane *the motors, propellers and instruments were inspected and no evidence of mechanical failure found*: Would you be able to formulate an opinion as to the cause of the crash?" (R. 359-360).

The assumption "that after the crash and fire of the airplane the motors, propellers and instruments were inspected and no evidence of mechanical failure found" was based solely upon the testimony of Mr. Richard Davis. He was the aircraft engine mechanic, called as an expert witness by defendants, who disassembled the engines and made the inspection referred to by defendants' counsel in this question (R. 198-199). On cross-examination Mr. Davis testified:

"Q. You referred to the remains of the engines. I took it from that you meant that they were subject to a considerable state of destruction at the time you made your inspection, is that true?

A. *Yes,* I would say *they were in a considerable state of destruction.*

Q. So that *all you could do was to take the remains of the engines as they were made available to you and do your best on that basis?*

A. That is correct.

Q. So that considering there had been a fire and consequent destruction, *is it not the case that there may have been many things happening to the engines, whatever kind, that wouldn't be available to you by way of evidence when you* [73] *saw the remains?*

A. I might answer that this way: externally *the engines were considerably destroyed, along with most of the accessories"* (R. 203).

On cross-examination, Mr. A. Elliott Merrill testified that there might be one of several causes that would cause the airplane to veer to the left on the runway, having nothing whatever to do with negligence on the part of the pilot. Some of these alternative, possible causes, are:

(1) The engines might be functioning normally, but the "governor" regulating the speed of any one of the propellers might fail on take-off, which would cause a particular propeller to turn faster than normal. If this happened on the right side of the airplane, the propeller there would cause the plane to turn left, because it would exert more pull on the right wing than on the left (R. 364).

(2) If the take-off was made by instruments, rather than by visual reference to the ground, the failure of any one of several directional instruments might cause the observed turning (R. 366).

(3) If the take-off was made with reference to visual runway conditions, the failure of the windshield swipes or other equipment could cause serious trouble in the pilot's keeping direction (R. 366).

Mr. Merrill testified further that failure because of "metal fatigue" can occur at unpredictable moments even immediately after inspections; that this happened "occasionally" (R. 366-367). He said, further, that the more complex a mechanism, such as airplane, is, the more likely this is to occur (R. 367).

He did testify that in forming his opinion, referred to above, as to the cause of the crash, he "considered the possiblity of all those things happening" (R. 367). However, his consideration of such possibilities was based upon the assumptions he was asked to make in the question he was to answer above, namely, that other witnesses had made proper examinations of engines, propellers, accessories and other items and found that nothing about them had caused the accident.

Any Finding of Negligence Must Be Based Upon "*Res Ipsa Loquitur.*"

From the foregoing it is evident that whatever the cause of the crash was, its nature was not established by the evidence. The only basis for a finding of negligence would have to come from an application of the doctrine of *Res Ipsa Loquitur.*

This was the conclusion of the Superior Court of King County in the action brought by King County against the insured for damage to the County's revetment in the crash. The court there said in its memorandum opinion:

> "Plaintiff contends that the take-off constituted negligence after Vineyard had given his opinion that such an attempt was unsafe. It is to be remembered that the other two planes, at or about the same time, safely made their flights. Whether the swerving of the plane was due to ice upon the wings is in my opinion speculative. It therefore follows that for the plaintiff to prevail, it must do so upon the doctrine of *res ipsa loquitur* (R. 134).
>
> * * *
>
> "Passenger planes by the hundreds and thousands daily take off from fields such as this. Accidents frequently occur in the air, to which accidents the doctrine of *res ipsa loquitur* may or may not be applicable. Certainly the veering of the plane from the runway is an accident which normally and ordinarily does not occur unless there is a mechanical failure or a human failure, and when the accident and the circumstances attending it could not well have happened without negligence, a presumption of negligence on the part of the operator arises from the proof of such facts" (R. 134-135).

Would respondents contend an insurer may meet the burden of proving its affirmative defense of negligence simply by invoking the doctrine of *res ipsa loquitur?* We believe this position is so untenable that respondents themselves would not try to take it. If they do, we request only that they say so in explicit

terms, in which event a reply on this point will be offered.

III.

The Trial Court Erred in Excluding Evidence and Rejecting Plaintiffs' Offer of Proof Relating to Weather and Air Traffic Conditions.

We think that what has been said so far is amply sufficient to justify reversal of the trial court's judgment. We prefer to rely on the foregoing, to justify a reversal, rather than to invite any undue emphasis upon the following, which we believe would call for a new trial.

Remembering that the bulk of defendants' defense related to alleged weather and icing conditions, one must recognize the materiality of the following question put by plaintiffs upon cross-examination to Mr. Robert Wiley, the Airport Traffic Controller at Boeing Field:

> "Q. Mr. Wiley, what other transport aircraft, if any, took off from Boeing Field within a period of approximately half an hour prior to the accident in question?" (R. 176).

The trial court acknowledged that the question was material, stating that "the conditions of flight as affecting safety of take-off of the plane in question at or about the time it attempted to take off are material" (R. 177).

Mr. Wiley, however, used certain notes while being cross-examined by plaintiffs. Defendants objected to his doing so, either on the ground that the notes were improper or that the particular use made of them by

the witness was (R. 177-178). This objection was sustained by the court (R. 179). Counsel for plaintiffs then stated that

> "In deference to the court's ruling we will defer further questions of this witness until we have had an opportunity of checking further on the notes" R. 179).

Thereupon the court directed that the witness be excused from the stand, but that he should "remain in attendance until later excused" (R. 179), which was not done until the conclusion of the trial.

After the defendants had put on their case plaintiffs called Mr. Wiley back to the stand and asked the same question as that above set forth (R. 465-466). Objection was made to the question and sustained by the court. It is abundantly clear from the remarks of the court and the colloquy between court and counsel that the court's basis for excluding this testimony was that it was not proper rebuttal—that the testimony should have been introduced by the plaintiffs as a continuation of their cross-examination, if not as a part of their case in chief (R. 465-469; 479-487).

Negligence on the part of the insured being an affirmative defense interposed by defendants, it was not incumbent upon plaintiffs to disprove negligence unless or until defendants introduced evidence in proof of it. Plaintiffs might have withheld any cross-examination of Mr. Wiley, then called him or someone else as their witness on rebuttal. In either case, it was only on rebuttal that plaintiffs could introduce their evidence on the issue of negligence.

Any argument such as that made by defendants to the trial court (R. 480-482), to the effect that defendants had excused their witnesses before Mr. Wiley was called back on rebuttal, is beside the point. Defendants knew that the court had excused Mr. Wiley from the stand and explicitly directed that he remain in court until excused (R. 179), which could be only for the purpose of enabling plaintiffs to submit further testimony through him. Plaintiffs could have called someone else besides Mr. Wiley on rebuttal, covering the same subject matter. Is it unfair that plaintiffs recalled one of defendants' witnesses instead, or were plaintiffs under some duty to forewarn defendants of such an intention so that defendants could retain in court persons to refute their own witness by surrebuttal?

Upon the court's sustaining the objection to such testimony, noted above, plaintiffs made the offer of proof set forth below. This is so clearly pertinent to the issues involved that it was prejudicial error for the trial court to reject this offer:

> "We offer to prove by the witness Robert Wiley that during the period of one-half hour immediately preceding the accident in question, several scheduled and non-scheduled passenger aircraft took off from the north end of the runway at Boeing Field under conditions of safe operation.
>
> "We offer to prove by the witness Crooks that about 9:35 he, as a captain on one of the United Air Lines' planes, took off from the north end of the runway at Boeing Field; that the runway surface at that time was not unusually icy; that he could apply brakes on the plane even while the

motor was being run up prior to take-off without substantial slipping or skidding; that he could see the lights along both sides of the runway [343] clearly on down either to the end or substantially to the end of the runway; that he made a contact take-off, not an instrument take-off, and that the take-off was made without any unusual difficulty and with complete safety. We offer to corroborate that evidence by the co-pilot, Mr. Popham.

"We offer to prove by the witness Strobel that as captain on an Air Transport Command aircraft, just a few minutes after the United flight , mentioned, that he took off from the north end of the runway and found substantially the same conditions as were summarized and observed by Mr. Crooks" (R. 482-483).

* * * *

"We offer further to prove by the witness Robert Wiley that immediately prior to the take-off of the aircraft involved in this accident, that he was in the tower and while in charge of giving clearance for take-off to this and other aircraft, he was in direct communication with Chavers as the pilot of the aircraft involved in the suit, that substantially the following occurred in respect of the clearance for take-off" (R. 484).

* * * *

"That substantially the following occurred [345] which Mr. Wiley is prepared to testify from his own notes wthout reference to the CAB hearing: that after the tower, that is, after Mr. Wiley had informed him, Chavers, that he, Chavers, would be advised of any change of visibility, the pilot acknowledged that statement and said in substance that he, Chavers, could see the green range lights at the other end of the runway, meaning the

opposite or south end of the runway approximately five thousand or more feet away'' (R. 484).

* * * *

''We offer to prove then that he, Wiley, in reply to that report concerning the range lights at the opposite end of the runway stated in effect that the visibility was improving; that he, Chavers, in reply reported to the tower that he, Chavers, could still see the green lights at the opposite, meaning the south end of the runway, and that he was going to take off; that the tower, in response to that, said in effect that he was cleared for take-off and that the pilot should report when he got on top'' (R. 485).

CONCLUSION

It Is Submitted That the Holding of the Trial Court Should Be Reversed with Directions That Plaintiffs Have Judgment for the Amounts Asked in the Amended Complaint, Including Interest at 6% from Date of Loss and Costs

Since the trial court allowed plaintiffs no recovery, it did not pass upon the question of interest. We respectfully suggest that this be decided here so the entire controversy may be finally disposed of.

(11 With regard to appellants' first claim:

We thing appellees will not question the fact that if appellants are entitled to prevail the principal amount due them is $20,054.47. This is computed as follows: Agreed value of aircraft, $25,000.00. Less: Paid to United States under Endorsement No. 6, $3,305.33; salvage, $390.20; deductible under policy, $1,250.00; total deductions, $4,945.53. Balance due, $20,054.47 (R. 29, 30).

The date of the loss was January 2, 1949.

There is no provision in the policy extending or otherwise fixing the time of payment.

The Washington State statute provides that every loan or forbearance of money, goods or thing in action shall bear interest at the rate of six per cent per annum where no different rate is agreed to in writing between the parties.

Rem. Rev. Stat., § 7299.

Plaintiffs are entitled to interest at the statutory rate from the date the indebtedness became due.

Concordia Ins. Co. v. School Dist. (C.C.A. 10) 282 U.S. 545, 75 L.ed. 528, affirming 40 F.2d 379;

Jacobson v. Farmers Mut. F. Ins. Co. of Turlock, 5 Cal. App.2d 1, 40 P.2d 960;

Aetna Ins. Co. v. Soloman, 172 Ark. 169, 287 S.W. 1000.

Where there is no provision in the policy extending or otherwise fixing the time of payment or where, although there is such a provision, the insurer has waived it by denying liability *in toto,* interest runs from the date of the loss.

John Conlon Coal Co. v. Westchester Fire Ins. Co., 16 F.Supp. 93, 97. Affirmed (C.C.A. 3) 92 F.2d 160. Certiorari denied, 302 U.S. 751, 82 L.ed. 581;

J. Purdy Cope Hotels Co. v. Fidelity Phoenix Fire Ins. Co., 126 Pa. Super. 260, 191 A. 636;

Olson v. Herman Farmers' Mut. Ins. Co., 187 Wis. 15, 203 N.W. 743;

Home Insurance Company of New York v. Roll, 187 Ky. 31, 218 S.W. 471, 474;

Jensen v. Palatine Insurance Company, 81 Neb. 523, 115 N.W. 286.

(2) With respect to appellants' second claim:

The judgment in favor of King County was entered on October 9, 1950 for $2,566.70 and costs (R. 131). By the terms of Section 2, Subdivision 2, appellees agree to pay these costs and interest accruing on the judgment after entry thereof (page ..... ante).

Appellants are entitled to reasonable attorneys' fees and expenses incurred in defending the King County suit.

Shafer v. United States Casualty Co., 90 Wash. 687, 156 Pac. 861.

It was stipulated that if appellants are entitled to such fees $500 shall be the amount allowed (R. 67). Appellants incurred $34.90 expense in defending the action (R. 136).

Respectfully submitted,

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